

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDMUND J. DUNNING,

Plaintiff and
Appellant

vs.

WILLIAM A. HUGGINS, C. J.
GHISELLI, and MICHAEL G. RAFTON,

Defendants and
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DISTRICT

BRIEF FOR APPELLANT

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JURISDICTION -- ISSUE ON APPEAL

Jurisdiction is conferred upon this Court under the provisions of 12 USC Sec. 62 and 28 USC Par. 1331. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

The United States District Court dismissed this action for lack of jurisdiction on the ground that the required minimum jurisdictional amount of \$10,000.00 is not present. Plaintiff appeals on the ground that the amount in controversy satisfies the jurisdictional requirement of the United States District Court in that the amount exceeds \$10,000.00.

SUMMARY OF ARGUMENT

Plaintiff brought this action in tort to redress a tortious denial of a Federal right and for conspiracy to do the wrong complained of. The Federal right is the right of a shareholder to have access to a list of the names and residences of all the shareholders. The issue on appeal is whether the amount in controversy meets the \$10,000.00 jurisdictional amount.

I.

The jurisdictional amount in controversy is the amount of damages which Plaintiff in good faith avers is the result of Defendant's tortious denial of Plaintiff's Federal right.

II.

Alternatively, the amount in controversy is the value of the 'federal right.

III.

Also, the amount in controversy is the value of Plaintiff's shares.

ARGUMENT

I.

THE JURISDICTIONAL AMOUNT IN CONTROVERSY IS THE AMOUNT OF DAMAGES WHICH PLAINTIFF IN GOOD FAITH AVERS IS THE RESULT OF DEFENDANTS' TORTIOUS DENIAL OF PLAINTIFF'S FEDERAL RIGHT.

This is an action in tort to redress a wrongful denial of a Federal right and for conspiracy to do the wrong complained of. Plaintiff prays for a remedy in two parts. In the one part, Plaintiff prays for \$25,000.00 general damages and for \$50,000.00 punitive damages. But the wrong is such that money damages alone cannot make the Plaintiff whole. Complete relief can only be given by restoration of the right. So, in the other part, Plaintiff prays for ancillary relief in the form of mandamus to compel compliance with Plaintiff's right and Defendants' duties. See:

1 Moore's Federal Practice 822,
Para. 0.90(3)

As the learned United States District Court noted in the Memorandum of Decision, last paragraph on page 28 of the Transcript of Record, a non-Federal cause of action cannot supply the jurisdictional amount for a Federal cause of action which fails to meet the jurisdictional amount required.

Hurn v. Oursler, 289 U.S. 238. But here the State cause of action for conspiracy is inseparable from the Federal statutory wrong. The tortious denial of the Federal right and the conspiracy to deny the Federal right raise a substantial Federal question because the action is predicated upon a right which did not exist under common law, does not exist under the laws of California, and was created by an Act of Congress; See:

Hurn v. Oursler, supra.

Congress gave to shareholders of national banks the absolute right to inspect a full and correct list of the names and residences of all the shareholders during business hours of each day in which business may be legally transacted. See:

12 U.S.C.A. sec. 62 and cases
there cited.

The Plaintiff is a shareholder of the Central Valley National Bank whose right under 12 U.S.C.A. sec. 62 was invaded pursuant to a conspiracy to invade his Federal right. Thus, the extent and nature of the legal consequences of the wrongful denial of Plaintiff's right, though left by the statute to judicial determination, are nevertheless Federal questions. See:

J. I. Case Co. v. Borak
377 U.S. 426, 12 L. ed. 2d 423.



Therefore, the only question is whether the amount in controversy under the wrongful denial of the Plaintiff's right exceeds \$10,000.00. Plaintiff in good faith alleges money damages far in excess of the \$10,000.00 jurisdictional amount. The amount claimed is not unreasonable under the facts alleged. And, though upon a determination on the merits of the case the Plaintiff may be awarded less than \$10,000.00, it does not appear to a legal certainty that the Plaintiff could not recover more than \$10,000.00. See:

Bell v. Preferred Life Assur. Soc.
320 U. S. 238, 88 L. ed.15.

Davenport v. Mutual Benefit Health
& Accident Ass'n. 325 F. 2d 785.
(C. A. 9)

II.

ALTERNATIVELY, THE AMOUNT IN CONTROVERSY IS THE VALUE OF THE FEDERAL RIGHT.

The Plaintiff contends that the amount in controversy is his damage arising out of the tortious denial of his Federal right. But if the Court determines that the amount in controversy is the value of the right itself, rather than the injury arising out of the tortious denial of the right, then the jurisdictional amount is found in the value of all the assets of the Central Valley National Bank or in the Bank's net worth as that reflects the value of the ownership of the Bank. This is because the ability to communicate with the shareholders is critical to control of the corporation.

Control of the corporation brings the entire value of the corporate assets into controversy in an analogous situation: Receivership. See:

Coskery v. Roberts & Mander Corp.
189 F. 2d 234 at 238 (C. A. 3)

No doubt the Defendants will cite other analogous situations to sustain their contention that the right of access to the list of shareholders has no substantial monetary value: The right to inspect the books and records of a corporation and a shareholder's pre-emptive right. But none of these analogies, including our analogy to receivership, are directly in point. Therefore, which analogy is really pertinent? We submit that receivership is the pertinent analogy because it deals directly with placing control in the hands of another. The pre-emptive right analogy runs second because it deals with maintaining the status quo of ownership and control rather than with who shall gain control. And the analogy to the right to inspect the books and records of a corporation runs a poor third because it preserves the owner's right to audit the acts of management rather than to gain control of the corporation.

In this case the relief asked for directly affects the right to the control of the corporation because those who control a corporation affect its management to such an extent that they determine the effectiveness of its management and so determine the value of the corporation. The "wrong" management of the corporation, and this one has total assets in

excess of \$185,000,000.00, could easily reduce the total assets by \$10,000,000.00, not to mention .1% of that sum. Accordingly, the amount in controversy is the entire value of the corporate assets, on the theory that the relief or control asked for affects the entire value of the corporation.

III.

ALSO, THE AMOUNT IN CONTROVERSY IS THE VALUE OF PLAINTIFF'S SHARES.

Where the Plaintiff asks for injunctive relief in the form of mandamus, though ancillary to the causes of action in tort, the amount in controversy is also the value of Plaintiff's property because mandamus would protect the value of Plaintiff's shares. See:

1 Moore's Federal Practice, 2d Edition,
Page 866, Para. .096, Injunctions

See, also:

Coskery v. Roberts & Mander Corp.,
Supra.

APPENDIX
12 USC Sec. 62

The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency. RS. § 5210.

CERTIFICATION

I certify that, in connection with the preparation of this Brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those requirements.

A. Grant Macomber
A. GRANT MACOMBER

CERTIFICATE OF SERVICE BY MAIL

I, A. GRANT MACOMBER, certify that I am one of the Attorneys for Plaintiff and Appellant in this action, and that I served three copies of the above Brief for Appellant by mail on Lempres and Seyranian, Attorneys for Appellee, Michael G. Rafton, and three copies of the Brief for Appellant by mail on Fitzsimmons and Petris, Attorneys for Appellees, Huggins and Ghiselli, on October 14, 1965.

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